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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS LEE DELANO,

Defendant and Appellant.

D073240

(Super. Ct. No. SCS294857)

APPEAL from a judgment of the Superior Court of San Diego County, Dwayne K. Moring, Judge. Affirmed and remanded with directions.

Christine M. Aros, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler and Julie L. Garland, Assistant Attorneys General, Steve Oetting and Warren J. Williams, Deputy Attorneys General for Plaintiff and Respondent.

A jury convicted Thomas Lee Delano of importation of methamphetamine (Health & Saf. Code, § 11379, subd. (a); count 1), possession of methamphetamine for sale (Health & Saf. Code, § 11378; count 2), and false impersonation (Pen. Code, § 529, subd. (a)(3); count 3). It also found true allegations that as to counts 1 and 2, the methamphetamine exceeded one kilogram (Health & Saf. Code, § 11370.4, subd. (b)(1)), four kilograms (Health & Saf. Code, § 11370.4, subd. (b)(2)), and 10 kilograms (Health & Saf. Code, § 11370.4, subd. (b)(3)).

The court sentenced Delano to the sheriff's custody as follows: four years on count 1 plus 10 years on that count's drug enhancement under Health and Safety Code section 11370.4, subdivision (b)(3), and eight months on count 3. The court imposed a "split sentence" that included four years of mandatory supervision under Penal Code section 1170, subdivision (h)(5)(b). Under Penal Code section 654, it imposed but stayed the sentence on count 2 and on each of the other drug enhancements. It also imposed as a condition of mandatory supervision an electronic search condition requiring Delano to "submit person, vehicle, residence, property, personal effects, computers, and recordable media to search at any time with or without a warrant, and with or without reasonable cause, when required by a [probation officer] or law enforcement officer."

Delano contends: (1) insufficient evidence supports the possession and transportation convictions; the court erroneously stayed, rather than struck, the Health and Safety Code section 11370.4 drug enhancements; and (3) the electronic search

condition is unconstitutionally overbroad. We affirm the judgment and remand with directions set forth below.

FACTUAL AND PROCEDURAL BACKGROUND

On July 11, 2017, as Delano drove his Hyundai into the United States through the San Ysidro port of entry, a United States Customs and Border Protection officer's dog alerted to something in the car's gas tank. The officer requested Delano's car keys, and Delano calmly handed them over without making any furtive movements.

A second officer was called, and Delano presented him an Oregon driver's license falsely identifying him as "William Helmick." That officer testified Delano did not act suspiciously and did not try to run or evade the officer. Following secondary inspection, the border agents obtained assistance to remove and cut open the gas tank. The parties stipulated that border agents found thirty-nine vacuum sealed bags containing 16 kilograms of methamphetamine inside.

A Department of Homeland Security special agent testified as follows: he investigated Delano's vehicle registration and determined that his vehicle was purchased in Mexico in early July 2017. An incomplete car registration application showed Delano attempted to register it under the name "William Jodeph [*sic*] Helmick," and gave a Blythe, California address. Homeland Security computer records indicated a "William Helmick" had crossed the San Ysidro border between 12 and 14 times, including twice using the Hyundai in the days before Delano's arrest. The remaining times, Delano, while using Helmick's identifying information, had crossed the border in a different

vehicle. No computer records showed that someone named "Thomas Delano" had crossed the border in the preceding 18 months.

Investigating officers testified they obtained Delano's text messages, phone logs, and internet search histories. Using an e-mail address of "HelmickWilliams6084@gmail.com," Delano communicated with USA Auto Insurance on July 10, 2017, regarding a vehicle stolen nine days earlier. Delano had searched the Internet for "William Helmick," "how do you make meth using methylamine," and "how many people have been arrested at the Sandra JC [*sic*] border crossing this month?" An officer testified that "Sandra JC" referred to the San Ysidro border crossing. Delano sent text messages to a male stating, "Just saying you fucked up homie because my people are the real deal." Another text message stated, "Okay. You fuck you need to get me the rest of my things. I don't care how you do it or you won't be around much longer. I know where you are. I know where you're at and so does the people that I work for. Just saying you have until midnight to call Pangwin with my shit. . . . This is you[r] only and last chance!" Delano's text messages to someone called "Pangwin" mentioned a California license plate for a 2007 Acura. Delano stated, "We seem to be doing a lot of work for you. . . . They want 300 for expenses and the 500." Delano addressed other text messages to "My Love," and stated, "I'm ok. Three guys tried to take me on a one-way ride but they got beat up instead and now my boss has me hidden until he can find me a new apartment. I'm a little [bruised] up but I'm okay."

A Department of Homeland Security special agent testified that Delano used the term "my boss" to refer to the person he worked for, and that Delano alluded to drugs in

some text messages. The special agent opined that a person stopped at the border with 16 kilograms of methamphetamine hidden in the gas tank of his registered vehicle would be knowingly transporting those narcotics. He testified that if the drug cartels' drivers were unaware they are carrying drugs, there was a risk that such costly merchandise would not reach its intended destination. He further testified he had never investigated a case involving an unknowing courier or "blind mule." However, he had heard of it in a specific instance involving small quantities of marijuana that were attached to the vehicles of people who lived close to the border and whose border crossing histories and patterns were known, like those persons who always parked at the same spot once they crossed into the United States. The special agent explained the difficulty of an unknowing carrier transporting large quantities of drugs: "If the person parks their car in like a—works at Wal-Mart and parks the car at Wal-Mart, it's going to be pretty difficult to extract the drugs from the gas tank. [¶] . . . you actually have to put it up on a lift and take the gas tank off. [¶] So there's more of a danger of being caught trying to extract the drugs."

The prosecutor asked the special agent if he would expect to find the driver's fingerprints and DNA on the packages or in the concealed area of the car. The special agent answered in the negative: "Basically, drug trafficking is a business. There are different individuals that take part in the business. [¶] . . . there [are] drivers that drive the drugs from point A to point B. There [are] recruiters that hire drivers to drive the vehicles. There [are] people that purchase the vehicles. There [are] people that load the drugs into compartments. There [are] people that actually build the compartments. [¶]

Usually it's all compartmentalized where each person has their own specific job or duty to do." The special agent added that because drug trafficking is an illegal business, those involved use nicknames and are not told about other people's roles in the business in order to protect the business. The special agent testified that drug traffickers hire drivers who typically engage in "burning plates," meaning that the driver "associat[es] a license plate with a driver basically crossing the border" because doing so allows drug traffickers to cross the border quickly and easily.

The special agent testified that the quantity of narcotics determines whether it is possessed for use or sale. A typical dose of methamphetamine is between .1 and .2 grams, and a heavy user would use around one gram a day. Quantities above that amount are usually for distribution. The methamphetamine seized from Delano was valued between \$61,000 and \$600,000.

Defense counsel asked the special agent on cross-examination: "What's the point of even telling the driver that you're taking drugs? Why aren't you just told to drive this car up there?" The special agent replied it was important to have good drivers, and the drivers need to know what they're carrying "[b]ecause if it turns out you have heroin, cocaine or meth and you were just paid to transport marijuana, that driver is not going to want to work for you and may even spread the word to other drivers, if that person knows. They don't want to work for you because something you should have been paid \$5,000 for and now only got paid \$500 for."

William J. Helmick, an Alaska resident, testified at trial that his wallet, including his driver's license, was stolen in 2016 while he was living in Oregon. Helmick stated he

had not traveled to Blythe, California since 2000. Helmick nonetheless received notices in January 2017 for traffic violations in California, including notices for failure to show proof of insurance or registration, and a bench warrant. Helmick testified that he had never met Delano nor given him permission to use his identity. Helmick did not register or use the "HelmickWilliam6084@gmail.com" e-mail address. Further, Helmick never attempted to register or insure a Hyundai or Acura within the previous year. Helmick had not been to Tijuana in the last year, did not purchase a Hyundai, and did not purchase insurance for a Hyundai.

DISCUSSION

I. Sufficiency of the Evidence

Delano contends that his count 1 and 2 convictions must be reversed because no substantial evidence shows that when he crossed the border he knew the methamphetamine was in the gas tank. Claiming he was convicted solely because he owned and drove the car, he argues no forensic or fingerprint evidence connected him to the gas tank or the drugs, he was not nervous or suspicious during his contacts with authorities, and no evidence connected him to a drug trafficking organization.

To determine the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible and of solid value, from which a rational trier of fact could find that the elements of the crime were established beyond a reasonable doubt. (*People v. Bolden* (2002) 29 Cal.4th 515, 553; *People v. Jennings* (1991) 53 Cal.3d 334, 364.) We need not be convinced of the defendant's guilt beyond a

reasonable doubt; we merely ask whether " 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) We must draw all reasonable inferences in support of the judgment. (*People v. Wader* (1993) 5 Cal.4th 610, 640.) It is not our function to reweigh the evidence, reappraise the credibility of witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact. (*Wader*, at p. 640.) We may not reverse a conviction for insufficiency of the evidence unless it appears that upon no hypothesis whatever is there sufficient substantial evidence to support the conviction. (*People v. Bolin* (1998) 18 Cal.4th 297.)

The crime of importation of a controlled substance requires that the defendant (1) imported a controlled substance into California; (2) knew of its presence; (3) knew the substance was a controlled substance; and (4) the controlled substance was in a useable amount. (Health & Saf. Code, § 11379, subd. (a); CALCRIM No. 2300.) The crime of possession for sale of a controlled substance consists of four elements: (1) defendant unlawfully possessed a controlled substance; (2) defendant knew of its presence; (3) defendant knew of its nature as a controlled substance; and (4) the defendant intended to sell the substance in an amount usable for consumption. (Health & Saf. Code, § 11378; *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242; *People v. Meza* (1995) 38 Cal.App.4th 1741, 1746; CALCRIM No. 2302.) These elements may be established by circumstantial evidence and any reasonable inferences drawn from such evidence. (*Palaschak*, at p. 1242; *People v. Tripp* (2007) 151 Cal.App.4th 951, 956.)

As noted, Delano challenges only the knowledge element of the crimes. We conclude circumstantial evidence supports the jury's finding that Delano knew about the presence and illegal character of the methamphetamine. Specifically, his use of a false name is strong circumstantial evidence that he knew he was committing a crime. Further, he searched the Internet for how to make methamphetamine, and for the number of border arrests in the past month at San Ysidro, the same port of entry where he crossed numerous times. A special agent testified Delano's text messages indicated he worked for a drug trafficking organization. In fact, Delano threatened others via text messages, and alluded to physical harm he had suffered in a deal gone bad. The jury could reasonably infer Delano was involved in drug trafficking based on those search terms and his references to drugs and his boss. Further, the special agent testified that drivers who transport drugs attempt to associate their specific car with their driver's license to expedite border crossings. Thus, the jury could reasonably conclude that Delano's border crossings in the days immediately before his arrest were test runs to prepare him for knowingly transporting the drugs. The special agent also testified about the hazards to a drug trafficking organization of having an unknowing courier; therefore, the jury could reasonably conclude that given the high street value of the drugs Delano transported, the drug cartel likely would not have risked losing that cargo by failing to inform Delano of it. In light of this evidence and the applicable standard of review in which we are to draw all inferences in favor of the jury's finding, we conclude the convictions are supported by substantial evidence. We decline Delano's invitation to reweigh the evidence in his favor.

II. Sentencing Errors on the Drug Enhancements

Delano contends that because the court imposed the sentence on one drug enhancement (Health and Saf. Code, § 11370.4, subd. (b)(3)), the trial should have stricken, rather than stayed, the additional drug enhancements. This argument has merit. In *People v. Estrada* (1995) 39 Cal.App.4th 1235, 1240, the trial court imposed a drug enhancement for the possession for sale of 40 kilograms of drugs and a concurrent enhancement for possession for sale of 20 kilograms under Health and Safety Code section 11370.4. The appellate court ordered the latter enhancement stricken. (*Estrada, supra*, at pp. 1239-1240.) Health and Safety Code section 11370.4, subdivision (e) states, "Notwithstanding any other provision of law, the court may strike the additional punishment for the enhancements provided in this section if it determines that there are circumstances in mitigation of the additional punishment and states on the record its reasons for striking the additional punishment."

In *People v. Cattaneo* (1990) 217 Cal.App.3d 1577, the trial court imposed but stayed a sentence on a weight enhancement under Health and Safety Code section 11370.4, subdivision (a)(2). The appellate court ruled: "While the trial court had discretion, pursuant to Health and Safety Code section 11370.4, subdivision (e), to strike the enhancement, it lacked authority to stay the time for the enhancement." (*Cattaneo, supra*, at p. 1588.) We reach the same conclusions here. The court had authority to impose or strike, but not stay, the sentence on the drug enhancements. Accordingly, we remand this matter for the trial court to exercise its discretion to impose or strike the enhancements in compliance with Health and Safety Code section 11370.4, subdivision (e).

III. *Electronic Search Condition*

Delano contends his electronic search condition is overbroad and thus violates his right to privacy under the Fourth Amendment of the federal Constitution.¹ The People argue Delano forfeited this argument because he did not raise it earlier. They argue that, in any event, the record does not contain the necessary particularized information supporting the need for a more narrowly tailored Fourth Amendment waiver condition, adding that "the potential invasiveness of the electronics-search condition in this case would be ameliorated by the restriction against arbitrary, capricious, or harassing probation searches."

¹ The issue of the validity of an electronic device search condition under *People v. Lent* (1975) 15 Cal.3d 481 and its progeny is pending before the California Supreme Court. (See, e.g., *People v. Ermin* (July 10, 2017, H043777) [nonpub. opn.], review granted Oct. 25, 2017, S243864; *People v. Nachbar* (2016) 3 Cal.App.5th 1122 (*Nachbar*), review granted Dec. 14, 2016, S238210; *In re A.S.* (2016) 245 Cal.App.4th 758, review granted May 25, 2016, S233932; *In re Mark C.* (2016) 244 Cal.App.4th 520, review granted Apr. 13, 2016, S232849; *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted Feb. 17, 2016, S230923.) We also note that currently there is a split of authority regarding the validity of broad electronic device search conditions of probation, and those cases are also pending before the California Supreme Court. (See *People v. Trujillo* (2017) 15 Cal.App.5th 574 (*Trujillo*), review granted Nov. 29, 2017, S244650; *People v. Bryant* (2017) 10 Cal.App.5th 396, review granted June 28, 2017, S241937; *In re R.S.* (2017) 11 Cal.App.5th 239, review granted July 26, 2017, S242387; *In re Patrick F.* (2015) 242 Cal.App.4th 104, review granted Feb. 17, 2016, S231428; *In re Alejandro R.* (2015) 243 Cal.App.4th 556, review granted Mar. 9, 2016, S232240; *In re J.E.* (2016) 1 Cal.App.5th 795, review granted Oct. 12, 2016, S236628.)

This court addressed a challenge by a defendant subjected to an electronics search probation condition in *Trujillo, supra*, 15 Cal.App.5th 574, which we discuss for its persuasive value. (Cal. Rules of Court, rule 8.1115(e)(1).) As we did in *Trujillo*, we reject Delano's argument that the electronics search condition is unconstitutionally overbroad as violating his fundamental privacy rights under *Riley v. California* (2014) 573 U.S. ____ [134 S.Ct. 2473] (*Riley*). Delano suggests we should follow the decisions invalidating the condition as overbroad in *Malik J.* (2015) 240 Cal.App.4th 896, *People v. Appleton* (2016) 245 Cal.App.4th 717, 723, and *In re P.O.* (2016) 246 Cal.App.4th 288. He argues the condition is not narrowly tailored to his individualized situation, claiming in reliance on *Riley*: "Unless the defendant has a history of storing illegal content on his computer, utilizing electronic means to embezzle money, stalking, hacking, or otherwise perpetrating an offense that is related to usage of a computer, the government does not have a compelling and unqualified interest in accessing all of this information."

In *Trujillo*, we distinguished *Riley* and followed authority explaining that the overbreadth analysis is materially different from the warrant requirement at issue in that case. (*Trujillo, supra*, 15 Cal.App.5th at p. 587.) We observed that probationers do not enjoy the absolute liberty to which law-abiding citizens are entitled, and that courts routinely uphold broad probation conditions permitting searches of a probationer's residence without a warrant or reasonable cause. (*Id.* at pp. 587-588.) Here, as in *Trujillo*, the factual record showing Delano used his cell phone to communicate about drug deals supports a conclusion that the electronics-search condition is necessary to protect public safety during his four-year supervision period, and a routine search of his

electronic data "is strongly relevant to the probation department's supervisory function." (*Id.* at p. 588.) We adopt a similar conclusion as *Trujillo*: "Absent particularized facts showing the electronics-search condition will infringe on [Delano's] heightened privacy interests, there is no reasoned basis to conclude the condition is constitutionally overbroad or to remand for the court to consider a more narrowly-drawn condition." (*Id.* at p. 589.)

DISPOSITION

The judgment is affirmed. We remand the matter for the superior court to exercise its discretion to impose or strike the previously stayed drug enhancements under Health and Safety Code section 11370.4, subdivision (e). The trial court is directed to thereafter prepare an amended abstract of judgment and forward a certified copy of it to the Department of Corrections and Rehabilitation.

O'ROURKE, Acting P. J.

I CONCUR:

GUERRERO, J.

I CONCUR IN THE RESULT:

IRION, J.